90-1536

Supreme Court, U.S.
FILED
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No. _____

IN THE

Supreme Court of the United States

October Term, 1990

WARDEN JAMES RAY, et al.,
Petitioners

v.

ROBERT LEE BUTLER, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF FEDERAL COURTS HAVE THE INHERENT AUTHORITY TO APPOINT COUNSEL AS OPPOSED TO AN APPOINTMENT UNDER SECTION 1915(d).

II. WHETHER A FEDERAL COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. SECTION 2071.

III. WHETHER A PRO SE LITIGANT IS ENTITLED TO MORE THAN ONE COURT APPOINTED ATTORNEY.

IV. WHETHER A WRIT OF MANDAMUS WAS IMPROPERLY ISSUED WHEN THERE WAS NO USURPATION OF POWER NOR ABUSE OF DISCRETION.

PARTIES

Hon. Robert E. Varner	United States District Judge
Hon. Richard Cohen	Counsel For Plaintiffs/Respondents
Hon. Abigail P. van Alstyne	Counsel For Plaintiffs/Respondents
Hon. David Schoen	Counsel For Plaintiffs/Respondents
Hon. Harry A. Lyles	Counsel For Defendents/Petitioners
Hon. Alice A. Boswell	Counsel For Defendents/Petitioners
Hon. David B. Byrne, Jr.	Counsel For Defendents/Petitioners
Robert Lee Butler	Plaintiff/Respondent
Gordon Vaughn	Plaintiff/Respondent
Andy Wayne Daughtry	Plaintiff/Respondent
Vincin Davis	Plaintiff/Respondent
Lionel Green	Plaintiff/Respondent
Glennon Hoppins	Plaintiff/Respondent
Lord Divine Allah	Plaintiff/Respondent
Guy Hunt	Defendant/Petitioner
Morris Thigpen	Defendant/Petitioner
Robin Swift	Defendant/Petitioner
E. L. Harrelson	Defendant/Petitioner
James Ray	Defendant/Petitioner

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No. _____

IN THE

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October Term, 1990

WARDEN JAMES RAY, et al.,

Petitioners,

v.

ROBERT LEE BUTLER, et al.,

Respondents.

PETITION FOR WRITE OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

The petitioners respectfully pray that a writ of certiorari issue to review the granting of mandamus that the Eleventh Circuit Court of Appeals has issued to the Honorable Robert Varner, United States District for the Middle District of Alabama.

OPINIONS BELOW

1. The granting of the writ of mandamus by the Eleventh Circuit is attached hereto as Appendix A to this petition. The District Court Opinion is attached hereto as Appendix B. The Writ of Mandamus is attached as the Supplemental Appendix.

JURISDICTION

The issuance of the writ of mandamus by the Eleventh Circuit was granted on December 19, 1990. This Court has jurisdiction under 28 U.S.C. Section 1254.

FEDERAL STATUTES AND RULES

28 U.S.C. Section 2071.
28 U.S.C. Section 1915(d).
Federal Rules of Civil Procedure 83.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES.

The Respondents have filed a lawsuit requesting that a class of inmates be certified. This lawsuit attacks the conditions of confinement at the Kilby Correctional Facility's Segregation Unit in Mt. Meigs, Alabama. The Middle District of Alabama has not yet certified the class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Over two years prior to the filing of the proposed class action, several cases were consolidated which attack the alleged unconstitutional conditions at the Kilby Segregation Unit.

On November 28, 1989, the Honorable Charles S. Coody, United States Magistrate for the Middle District of Alabama, appointed both Richard Cohen and David Schoen to represent the Plaintiff in *Lionel Green v. Dept. of Corrections*, Civil Action No. 88-D-1101-N. This lawsuit also attacked the conditions of confinement at Kilby's Segregation Unit. It is important to note that the order appointing them was not entered under the authority of 28 U.S.C. Section 1915(d). Thereafter, Abigail P. van Alstyne was employed by Southern Poverty Law Center specifically to work on this case. The Respondents' attorneys asked for consolidation of *Lionel Green*, with the *Butler* case, and filed an amended complaint requesting class certification. At this time, Mr. Schoen also represented Glennon Hoppins, an indigent inmate, who had filed several lawsuits attacking many of the same conditions of confinement which the class action lawsuit addressed.

On September 14, 1990, the Honorable Robert E. Varner, United States District Judge for the Middle District of Alabama, issued the order which is the subject of this petition for writ of certiorari. (Appendix B) In that order, Judge Varner relieved David Schoen and Richard Cohen of their

court appointment. Judge Varner appointed Abigail P. van Alstyne to represent the Plaintiffs in the consolidated cases as well as the Plaintiff class if and when such a class was certified. Likewise, this appointment was not made pursuant to 28 U.S.C. Section 1915(d). The order of the court specifically stated that the court had no objection if Mr. Schoen and Mr. Cohen wished to continue to help Ms. van Alstyne. The court set forth that there was only going to be one court appointed attorney. The court further stated that if Mr. Schoen and Mr. Cohen wished to withdraw from the case, they should file a motion for leave to withdraw.[1]

B. PROCEEDINGS BELOW

The Respondents filed their second amended complaint on April 13, 1990 requesting class certification and naming as Defendants the following: Guy Hunt, Governor of the State of Alabama; Morris Thigpen, Commissioner of the Alabama Department of Corrections; Robin Swift, Director of Finance for the State of Alabama; E. L. Harrelson, Warden of Kilby Correctional Facility; and James Ray, Deputy Warden of Kilby Correctional Facility.

The Petitioners filed their answer on May 31, 1990.

Judge Robert E. Varner issued the order sub judice on September 14, 1990. The Respondents thereafter, filed a motion for reconsideration on September 28, 1990, which was denied on October 4, 1990.

On October 15, 1990, the Respondents filed a petition for writ of mandamus to the Eleventh Circuit Court of Appeals.

The Petitioners filed their response to the petition for writ of mandamus on December 7, 1990.

On December 19, 1990 the Eleventh Circuit directed that a writ of mandamus be issued to the Honorable Robert E.

[1] Richard Cohen and David Schoen filed a notice to withdraw as counsel for Lionel Green on March 4, 1991.

Varner, United States District of Alabama. This writ directed Judge Varner to vacate the portion of his order relieving Richard Cohen and David Schoen as attorneys for the proposed Plaintiff class. The writ further directed that Judge Varner vacate his order appointing Abigail P. van Alstyne to represent Glennon Hoppins.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF FEDERAL COURTS POSSESS THE INHERENT AUTHORITY TO APPOINT AND REQUIRE COUNSEL TO SERVE.

In the Eleventh Circuit Court of Appeals opinion directing that a writ of mandamus be issued to Judge Robert E. Varner, United States District Judge for the Middle District of Alabama, the Court relied on *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). The Eleventh Circuit correctly noted that after *Mallard, supra*, a court may not use 28 U.S.C. Section 1915(d) to force an attorney to represent an indigent plaintiff if the attorney objects. However, the attorney in this case, Ms. Abigail P. van Alstyne, was not appointed under 28 U.S.C. Section 1915(d). Ms. van Alstyne was appointed to represent an indigent plaintiff pursuant to the inherent authority which the Federal Courts possess. In *Mallard, supra*, the court specifically appointed the attorney in that case under Section 1915(d). Such is not the case here. This case presents the issue left open in *Mallard:* whether federal courts have the inherent power to require lawyers to serve.

In *FTC v. Superior Court Trial Lawyers Association*, ___ U.S. ___, 110 S.Ct. 768 (1990), Justice Blackmun in his dissent noted:

> "Attorneys are not merely participants in a competitive market for legal services; they are officers of the

> court. Their duty to serve the public by representing indigent defendants is not only a matter of conscience, but is also enforcible by the government's power to order such representation, either as a condition of practicing law in the district, or on pain of contempt."

FTC v. Superior Court Trial Lawyers Association, at 791.

It is well recognized that Federal Courts have the inherent authority to regulate its bar. *Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). (District Court has discretion to adopt local rules that are necessary to carry out the conduct of its business.) *See, In re Synder*, 472 U.S. 634, 643 (1985).

In *Barnard v. Thorstenn*, 489 U.S. ____ 109 S.Ct. 1294, 103 L.Ed.2d 559(1989) this Honorable Court, in determining that a Virgin Island residency requirement was invalid, stated:

> "... if handling indigent criminal cases is a requirement of admission to the Bar, a non-resident knows that he must appear himself or arrange with a resident lawyer to handle the case when he is unavailable."

at 1302.

This Court has also recognized that bar members ". . . could be required to represent indigents and perhaps to participate in formal legal-aid work." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 105 S.Ct. 1272, 1280, 84 L.Ed.2d 205 (1985). An attorney, admitted to the bar, becomes an officer of the Court and is ". . . bound to render services when required by such appointment." *Powell v. Alabama*, 287 U.S. 45, 73, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932).

It is undisputed that Federal Courts possess inherent authority. Federal Courts have the power to appoint masters and experts as well as the power to sanction. See, *Roadway*

Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Ex parte Peterson*, 253 U.S. 300, 313 (1920).

Additionally, this Court has recognized that Federal Courts have inherent contempt powers. *Levine v. United States*, 362 U.S. 610 (1960) (criminal contempt powers are an inherent aspect of federal courts); *Cooke v. United States*, 267 U.S. 517, 539 (1925) (contempt power is essential in the administration of justice).

It is clear that this Court recognizes the importance of allowing Federal Courts to regulate their own bars. This power is fundamental and the appointment of Ms. van Alstyne should be upheld. Judge Varner's order appointing counsel (Ms. van Alstyne) clearly was not an abuse of discretion of an Article III Court's inherent powers. The Constitution does not require federal courts to engage in the "featherbedding" of appointed counsel.

II. A FEDERAL COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. SECTION 2071.

28 U.S.C. Section 2071 (1982) provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Rule 83 of the Federal Rules of Civil Procedure provides in pertinent part:

> "[i]n all cases not provided for by rule, the district judges and magistrate may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

Therefore, a Federal Court may regulate the proceedings before it if done so in a manner consistent with the Federal

Rules or statutes. *Franquez v. United States*, 604 F.2d 1239, 1244-45 (9th Cir., 1979) (jury trial was granted when a federal statute did not provide for such).

Clearly, Judge Robert Varner had the authority to appoint Abigail P. van Alstyne to represent an indigent litigant. Not only does inherent authority exist which empowers a Federal District Judge to appoint counsel, but under Rule 83 of the F.R.C.P. and U.S.C. Section 2071 the Court has the express authority. If Judge Varner had the power by any authority to appoint Ms. van Alstyne, his Order should be upheld even if wrong grounds were relied upon. See, *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943). The District Court was within its authority in appointing Ms. van Alstyne.

III. A PRO SE LITIGANT IS NOT ENTITLED MORE THAN ONE COURT APPOINTED ATTORNEY.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Honorable Court held that the Sixth Amendment right to counsel requires only that a defendant be provided "reasonably effective assistance." *Strickland, supra*, at 687. Plaintiffs do not have a "right" to have more than one court appointed attorney. The attorney appointed by Judge Varner, Ms. Abigail P. van Alstyne, clearly provides the reasonably effective assistance required in *Strickland*. Ms. van Alstyne was handling the majority of the day to day preparation of the case. Furthermore, Ms. van Alstyne was law clerk to the Honorable John Carroll, United States Magistrate for the Middle District of Alabama for two years handling 42 U.S.C. Section 1983 cases. In fact, Ms. van Alstyne was specifically employed by Southern Poverty Law Center to handle this "prison condition case."

Having three lawyers representing the inmates in this case obviously would result in an extreme amount of overlapping of work and duplication of expenses. Having just one appointed attorney would place a reasonable limit on the

amount of attorneys fees, if in fact, the plaintiffs were to prevail. In appointing one attorney, Judge Varner was not attempting to limit *reasonable* attorneys fees, but only those which would necessarily overlap and result in duplicative billing. Given that in less than nine months, $8,000.00 in expenses had already been incurred and 1600 attorney hours and 800 paralegal hours had been generated, there was an apparent need for some control to be exercised over the attorneys fees in this case. Judge Varner's attempt to reasonably contain attorneys fees in this case at the "front end," is clearly desirable, especially in light of the fact that such expenditure would further deplete the limited resources of the Department of Corrections if the inmates were to prevail. The Court's actions were clearly designed to promote the efficient resolution of these cases. The appointment of one lawyer to this case is clearly within the discretion of Judge Robert E. Varner. A civil litigant clearly is not entitled to more representation than a criminal Defendant whose very liberty is at stake.

Certiorari should be granted since the Eleventh Circuit Court of Appeals found that Judge Varner could not appoint Ms. van Alstyne under 28 U.S.C. 1915(d), when in fact Ms. van Alstyne was appointed under the inherent authority that the Federal Courts possess. This appointment is also permissible under F.R.C.P. 83 and 28 U.S.C. Section 2072.

A Federal judge has the authority to limit an appointment in a civil case to one attorney. A review of such is not a proper use of the writ of mandamus.

IV. THE WRIT OF MANDAMUS WAS IMPROPERLY ISSUED WHEN THERE WAS NO USURPATION OF POWER NOR ABUSE OF DISCRETION.

The Writ of Mandamus is an extraordinary remedy. Mandamus should only issue when exceptional circumstances exist which amount to a judicial "usurpation of power." To

ensure that such a writ will only issue under extraordinary circumstances, this Court has set forth certain conditions which must be met in order for the writ to be granted. The party seeking Mandamus must clearly show that there are no other adequate means to obtain the relief desired and that the Petition must show that such issuance is "clear and indisputable" to the extent of "abuse of discretion." *Kerr v. United States Court for the Northern District of California*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269 (1967).

This Court has also observed that a Writ of Mandamus is an extraordinary remedy as they ". . . have the unfortunate consequence of making the [District Court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him." *Kerr v. United States District Court for the Northern District of California, supra*, 426 U.S. at 402, 96 S.Ct. at 2124. This Court further stressed that piecemeal litigation should be discouraged in the interest of fair and prompt administration of justice. Granting such a writ without extraordinary circumstances existing would defeat this highly desirable goal.

The Respondents have failed to meet their burden of showing that they lack other means to obtain relief and have failed to show that there was a "clear abuse of discretion" such as to amount to a "usurpation of [the judicial] power." *Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1814, 1822 (1985), citing *Banker's Life and Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953). This Court in *Mallard* held that mandamus was proper as no alternative remedies existed and that: ". . . the principal reasons for our reluctance to condone use of the writ--the undesirability of making a district court judge a litigant, and the inefficiency of piecemeal appellant litigation—are not present here" (cites omitted).

The Respondents bear the burden of showing they lack

other means to obtain relief. Mandamus should never be used as a substitute for appeal. The Respondents failed to ask for certification of any controlling question of law for an immediate appeal under 28 U.S.C. 1292(b). See, *Eisenberg v. United States District Court for the Southern District of Illinois*, 910 F.2d 374 (7th Cir., 1990). They chose instead to circumvent their remedies and ask for the extraordinary writ of mandamus. The Respondents should not be allowed to willfully bypass their available options and opt for a writ of mandamus.

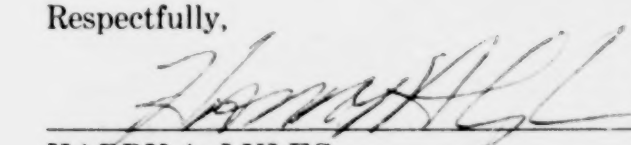
This case is easily distinguishable from *Mallard* in that Judge Varner has been forced into the role of litigant by the Respondents. Furthermore, the Respondents failed to show they lacked other means of obtaining the action sought. As such, the granting of the writ of mandamus by the Eleventh Circuit was improper.

Finally this case presents the clear and discrete issue left unanswered in *Mallard:* Whether Federal Courts have the inherent power to require lawyers to serve. The Petitioners respectfully suggest certiorari should be granted and the question answered in the affirmative.

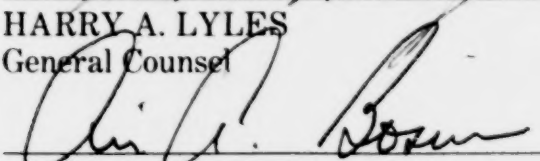
CONCLUSION

For the reasons stated, this Court should grant certiorari to decide the important Federal questions presented in this case.

Respectfully,



HARRY A. LYLES
General Counsel



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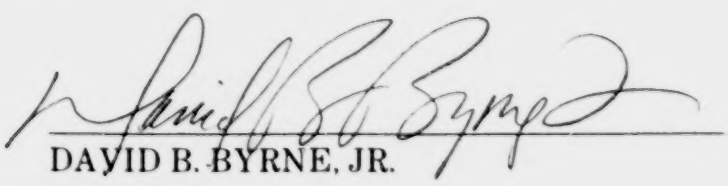

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

We, Harry A. Lyles, Alice A. Boswell, and David B. Byrne, Jr., do hereby certify that on this 4th day of April, 1991 we did serve three copies of this petition and appendix on Respondents by placing same in the United States Mail, first class, postage prepaid and properly addressed to counsel of record for Respondents as follows:

Hon. J. Richard Cohen
Hon. Abigail P. van Alstyne
Southern Poverty Law Center
P. O. Box 2087
Montgomery, Alabama 36102-2087

Hon. David Schoen
2800 Zelda Road
Suite 100-6
Montgomery, Alabama 36106

We further certify that we have served all parties required to be served.

HARRY A. LYLES
General Counsel

ALICE A. BOSWELL
Assistant General Counsel

DAVID B. BYRNE, JR.
Counsel

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-7837

IN RE:

LORD DIVINE ALLAH,
VINCIN DAVIS,
ANDY DAUGHTRY,
GORDON VAUGHAN, and
LIONEL GREEN,

Petitioners.

On Petition for Writ of Mandamus
to the United States District Court
for the Middle District of Alabama

(December 18, 1990)

Before TJOFLAT, Chief Judge, JOHNSON, and COX, Circuit Judges.

BY THE COURT:

Petitioners' motion for leave to file a reply to respondents' answer to the petition for writ of mandamus is GRANTED.

Respondents' motion to remand this case to the district court for the purpose of holding an evidentiary hearing is DENIED.

The petition for writ of mandamus is GRANTED in part and DENIED in part. We issue a writ of mandamus to the United States District Court for the Middle District of Alabama, directing The Honorable Robert E. Varner to vacate that portion of his order which removed Richard Cohen and David Schoen as attorneys for the proposed plaintiff class in the consolidated actions *Butler v. Hunt*, No. 87-V-058-N, and *Green v. Hunt*, No. 88-D-1101-N.

We also issue a writ of mandamus directing that Judge Varner vacate that portion of his order appointing attorney Abigail van Alstyne to represent plaintiff Glennon Hoppins. After the Supreme Court's decision in *Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, 109 S.Ct. 1814 (1989), a court may not use 28 U.S.C. § 1915(d) to force an attorney to represent an indigent plaintiff if the attorney objects. Ms. van Alstyne asserts that she does not wish to represent Mr. Hoppins for ethical and professional reasons. She has attempted to withdraw as Mr. Hoppins' attorney, through her motion for reconsideration of the district court's order, and the district court has denied her motion. Ms. van Alstyne has shown that she "lack[s] adequate alternative means to obtain the relief [she] seek[s]," *id.* at ___, 109 S.Ct. at 1822; the extraordinary remedy of a writ of mandamus is therefore justified.

We decline to issue a writ of mandamus directing that Judge Varner vacate that portion of his order which assertedly consolidated the cases in question. We do so without resolving the conflict between the parties as whether this order actually consolidated the cases. We note instead that a district court's order consolidating cases for trial is not a proper subject for mandamus relief absent a clear abuse of discretion, see *Pet Milk Co. v. Ritter*, 323 F.2d 586, 588 (10th Cir. 1963) (per curiam).

IT IS SO ORDERED.

APPENDIX B

IN THE UNITED STATES COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

LORD DIVINE ALLAH,
ROBERT LEE BUTLER,
GLENNON HOPPINS,
LIONEL M. GREEN, ETC.

Plaintiffs,

v.

E. L. HARRELSON,

Defendants.

CIVIL ACTION NO. 86V-793-N
CIVIL ACTION NO. 87V-058-N
CIVIL ACTION NO. 87V-780-N
CIVIL ACTION NO. 87V-864-N
CIVIL ACTION NO. 88V-005-N
CIVIL ACTION NO. 88V-1101-N

ORDER

Upon consideration of the files and records in the above-styled cases, this Court is entering this Order in an effort to clarify certain matters, as well as to set specific dates regarding discovery, trial, etc. Therefore, it is ORDERED by this Court:

1. That all of the above-styled cases are hereby consolidated as provided by Rule 42(a), Federal Rules of Civil Procedure.

2. That the Hon. Abigail P. van Alstyne is hereby appointed to represent the Plaintiffs in said cases, as well as the Plaintiff Class if and when such a class is certified by this Court. [1]

3. That the Hon. David Schoen and the Hon. J. Richard Cohen are hereby relieved of their previous appointments as Plaintiffs' counsel in Civil Action No. 87V-780-N and 88V-1101-N.[1]

4. That, effective with the date of this Order, the parties are to file all future pleadings, motions, etc., regarding these consolidated cases in Civil Action No. 87V-58-N, presently styled *Robert Lee Butler v. Warden James Ray, et al*, and the Clerk's Office is DIRECTED to mark the Court's docket sheets accordintly.

5. That, on or before October 15, 1990, Plaintiffs file with this Court a Comprehensive Amended Complaint setting forth Plaintiffs' specific claims in these cases. Said Comprehensive Amended Complaint will replace **all** prior complaints, amended complaints, and any amendments thereto filed in the above-styled cases.

---

[1] In reviewing the files in these cases, this Court noticed that two attorneys (Messrs. David Schoen and J. Richard Cohen) had been appointed by the Court to represent the Plaintiff, Lionel M. Green, in Civil Action No. 88V-1101-N [see Order dated November 28, 1989]; that Attorneys J. Richard Cohen, Abigail P. van Alstyne, and David Schoen had made an appearance on behalf of Robert Lee Butler in Civil Action No. 87V-58-N [see Notice of Appearance filed January 19, 1990]; that the Hon. David Schoen had been appointed to represent Plaintiff, Glennon Hoppins, in Civil Action No. 87V-780-N [see Order dated September 30, 1987]; and that no attorney had been appointed to represent Plaintiffs in Civil Actions No. 86V-793-N, 87V-864-N, and 88V-5-N. The purpose of Paragraphs 2 and 3 of this Order is to clarify for the record that there will be only one court-appointed attorney in these cases. If the other attorneys want to continue to help the Plaintiffs' court-appointed attorney, the Court has no objection. However, if said attorneys wish to withdraw from the cases and let court-appointed counsel continue alone, they may file a motion for leave to withdraw with the Court.

6. That, on or before November 5, 1990, the Defendants file their Answer to said Comprehensive Amended Complaint.

7. That all discovery in these cases be completed on or before January 11, 1991.,

8. That the trial of these cases is hereby scheduled for March 11, 1991, at 9:00 a.m., in Montgomery, Alabama.

9. That the jury for trial of these cases will be selected on February 25, 1991, at 10:00 a.m., in Montgomery, Alabama.

DONE this 14th day of September, 1990.

R. E. VARNER
UNITED STATES DISTRICT JUDGE

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

IN RE:

LORD DIVINE ALLAH,
VINCIN DAVIS,
ANDY DAUGHTRY,
GORDON VAUGHAN, and
LIONEL GREEN,

Petitioners.

WRIT OF MANDAMUS

To the HONORABLE ROBERT E. VARNER, Senior Judge of the United States District Court for the Middle District of Alabama.

Whereas the United States Court of Appeals for the Eleventh Circuit rendered its decision on December 18, 1990 granting in part and denying in part a petition for writ of mandamus; NOW THEREFORE you are commanded to vacate that portion of your order which removed Richard Cohen and Davis Schoen as attorneys for the proposed plaintiff class in the consolidated actions *Butler v. Hunt*, No. 87-V-058-N, and *Green v. Hunt*, No. 88-D-1101-N and that portion of your order which appointed attorney Abigail van Alstyne to represent plaintiff Glennon Hoppins, all in conformity with this court's opinion of December 18, 1990. Done this 19th day of December, 1990.

A True Copy - Attested
Clerk, U.S. Court of Appeals,
Eleventh Circuit

By: Nancy Halbrook
Deputy Clerk
Atlanta, Georgia

MIGUEL J. CORTEZ, Clerk
United States Court of
Appeals for the
Eleventh Circuit

Miguel J. Cortez

Supreme Court, U.S.
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(2)

No. 90-1536

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

WARDEN JAMES RAY, *et al.*,

Petitioners,

v.

ROBERT LEE BUTLER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. WHETHER THE PETITION FOR WRIT OF CERTIORARI WAS FILED BEYOND THE STATUTORY TIME LIMIT IMPOSED BY 28 U.S.C. §2101(c).

II. WHETHER A DISTRICT COURT JUDGE MAY SUMMARILY DISMISS TWO OF THREE ATTORNEYS, INCLUDING LEAD COUNSEL, FROM AN ONGOING CASE AS A MEANS OF REDUCING THE ATTORNEYS' POTENTIAL FEE AWARD UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

III. WHETHER A DISTRICT COURT JUDGE MAY COMPEL AN ATTORNEY TO REPRESENT A PARTICULAR LITIGANT AFTER *MALLARD* WHEN SUCH REPRESENTATION WOULD CAUSE ETHICAL AND CASE MANAGEMENT CONFLICTS.

PARTIES

Guy Hunt ..... Defendant-Petitioner
Robin Swift ..... Defendant-Petitioner
Lynn Harrelson ..... Defendant-Petitioner
Morris Thigpen ..... Defendant-Petitioner

Robert Lee Butler* ..... Plaintiff-Respondent
Andy Wayne Daughtry ..... Plaintiff-Respondent
Vincin Davis ..... Plaintiff-Respondent
Lord Divine Allah ..... Plaintiff-Respondent
Gordon Vaughn ..... Plaintiff-Respondent
Lionel Green** ..... Plaintiff-Respondent
Glennon Hoppins*** ..... Plaintiff-Respondent

* Although Robert Lee Butler was dismissed from the case several months after its filing, the case still bears the name *Butler v. Hunt.*

** Lionel Green is not a plaintiff in the *Butler* class action suit. He has an independent action that was consolidated with the *Butler* case at plaintiffs' request. Contrary to the implication carried by defendant-petitioners' footnote no. 1, *see* Petition for Writ of *Certiorari* at 4, Mssrs. Cohen and Schoen did not file a motion to withdraw from Mr. Green's case pursuant to the district court's September 14th order. Rather, both they and Ms. van Alstyne filed a motion to withdraw from Mr. Green's case because of conflicts of interest that were interfering with their ability to effectively represent Mr. Green.

*** Glennon Hoppins is also not a named plaintiff in the *Butler* class action. In fact, the district court's order that Ms. van Alstyne represent him, in violation of the holding in *Mallard*, was the basis for part of plaintiff-respondents' petition for writ of *mandamus*.

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JURISDICTION

The Eleventh Circuit Court of Appeals rendered the judgment on which review is sought in this Court on December 18, 1990. It is plaintiff-respondents' contention that the Court lacks jurisdiction to consider this petition because it was not filed within ninety days of that judgment. *See* 28 U.S.C. 2101(c).

FEDERAL STATUTES

28 U.S.C. §1915(d) -- Proceedings *in forma pauperis*

The court may request an attorney to represent any such person [who is proceeding *in forma pauperis*] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. §2101(c) -- Supreme Court; time for appeal or *certiorari*; docketing; stay

Any other appeal or any writ of *certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of *certiorari* for a period not exceeding sixty days.

28 U.S.C. §2071 -- Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

42 U.S.C. §1988 -- Proceedings in vindication of civil rights; attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

In early January 1990, plaintiff-respondents filed an amended complaint in a class action lawsuit on behalf of inmates who had been and were being subjected to unconstitutional conditions and to the deprivation of First, Sixth, Eighth and Fourteenth Amendment rights in an Alabama state prison. The suit had originally been filed three years earlier as a *pro se* complaint by Robert Lee Butler, one of the plaintiffs. His complaint, along with those of several other prisoners, had languished at the district court level for some time, in part because the court could not find local counsel willing to undertake representation of inmates in a complex and expensive §1983 action.

Lead counsel in the case was Richard Cohen, litigation director for the Southern Poverty Law Center. Mr. Cohen and David Schoen, a solo practitioner, had previously agreed to accept appointment in a suit by an individual inmate, *Green v. Hunt, et al.*, No. 88-D-1101-N (M.D. Ala. filed Jan. 24, 1990); they entered the *Butler v. Hunt* case, however, without court appointment. An associate of Mr. Cohen's, Abigail van Alstyne, also entered an appearance on behalf of the *Butler* class.

During a status conference held before the magistrate in February 1990, all the inmates who had filed *pro se* complaints alleging unconstitutional conditions in the segregation unit of Kilby Correctional Facility, with the exception of Robert Lee Butler, were informed that their claims would be stayed pending resolution of the *Butler* action. Even though the court had issued a consolidation order two years before counsel entered the case to file the amended complaint, the court exercised its supervisory authority to stay the other actions so that the amended class complaint could be effectively litigated and managed.

Nine months after the amended complaint had been filed,[1] District Court Judge Robert Varner entered an order, *sua sponte*, removing Mssrs. Cohen and Schoen from the case and appointing Ms. van Alstyne as the plaintiffs' sole attorney. During an unrecorded status conference to address the plaintiff-respondents' motion for reconsideration of that order,[2] the judge indicated that his rationale for entering the order was to try to control the amount of attorneys' fees that would be awarded to the plaintiffs should they prevail in the suit. In line with that thinking, he stated that, although Mssrs. Cohen and Schoen could continue to assist Ms. van Alstyne on the case, they would not be permitted to participate in the trial and would not be allowed to recover any fees for future work they performed on the case.

Plaintiffs argued that the judge's order would unjustly tip the balance in favor of the defendants by restricting scores of inmate plaintiffs housed in prisons throughout the state to a single attorney while simultaneously allowing the defendants, state officials with similar defenses, all working within a few miles of their attorneys' offices, to be represented by four attorneys. They also argued that Congress intended attorneys' fee awards to be one of the chief guarantees for the vindication of constitutional and civil rights by poor and powerless citizens, and that state defendants would have little incentive to abide by constitutional dictates if their financial exposure were limited in advance. Plaintiffs also pointed out that the judge's order would have the broad effect of discouraging lawyers and firms from taking on time-consuming and difficult *pro bono* work because

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[1]The case was actively litigated during the nine-month period. Counsel attended several hearings and status conferences, filed several pleadings, and conducted considerable discovery. Counsel for the plaintiffs also stayed in regular communication with their clients.

[2]The plaintiffs had requested a hearing on their motion.

of the possibility that, after devoting several months of hard work and resources to a case, they could be summarily removed. Finally, they argued that the judge's concerns about duplicative fee awards should be addressed at the conclusion of the case through careful scrutiny of any petitions the plaintiffs' attorneys submitted, assuming the plaintiffs prevailed. The judge rejected the arguments.

In addition to removing both lead counsel and co-counsel from the case, the judge ordered Ms. van Alstyne, the sole remaining plaintiffs' attorney, to represent a *pro se* inmate, Glennon Hoppins, whose seven independent actions were supposed to have been stayed by the magistrate's decision in February 1990.[3] Ms. van Alstyne informed the court that she was unwilling to accept an appointment to represent Mr. Hoppins. She expressed her belief that such an appointment would engender serious ethical problems under the Code of Professional Responsibility and that litigating Mr. Hoppins' cases with the *Butler* action would create a serious conflict of interest that might defeat class certification and would unquestionably delay the trial and resolution of the *Butler* case.

The ethical conflicts were fully explained to the court. Mr. Hoppins had vigorously objected to being represented, even indirectly, by attorneys from the Southern Poverty Law Center during the February 1990 status conference. Moreover, he had been uncooperative with plaintiffs' counsel during subsequent interactions and had refused to follow their advice or counsel. Of equal importance, Mr. Hoppins' tactics and litigation goals were in substantial conflict with those endorsed by the *Butler*

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[3]Although many of Mr. Hoppins' cases raise issues that are included in the *Butler* case, many of them also contain allegations and claims that are completely different. For example, Mr. Hoppins has sued over the classification system, conditions in prison dormitories, procedures relating to the treatment of aged inmates, and rights to privacy in the medical screening context. Those issues are beyond the scope of the *Butler* action.

plaintiffs, and counsel firmly believed that having to represent Mr. Hoppins along with the *Butler* class representatives would impede the orderly and sympathetic presentation of the *Butler* case.

When plaintiff-respondents' motion for reconsideration was denied by the district court judge, plaintiffs filed a petition for writ of *mandamus* with the Eleventh Circuit Court of Appeals. On December 18, 1990, the circuit court ordered that the writ be granted both as to the summary removal of the two attorneys and the order appointing Ms. van Alstyne to represent Mr. Hoppins. The Eleventh Circuit declined to consider the issue of the judge's proposed consolidation of all *pro se* inmate conditions suits pending in other judicial districts in Alabama on grounds that the question was not ripe.

ARGUMENT

I. *INTRODUCTION*

The petition for writ of *certiorari* should be denied for two independent reasons. First, it was not filed within the time period prescribed by Supreme Court Rule 13.4. Second, it does not meet any of the requirements for this Court's discretionary review under Supreme Court Rule 10.1.

II. *THE PETITION WAS NOT TIMELY FILED*

The threshold issue for consideration in this case is whether the petitioners' application for a writ of *certiorari* should be dismissed because it was not timely filed.

On December 18, 1990, a panel of Eleventh Circuit judges issued a *per curiam* decision and order granting in part and

denying in part plaintiff-respondents' petition for a writ of *mandamus* to the United States District Court for the Middle District of Alabama. The decision was filed the same day in the Eleventh Circuit Clerk's office. The court stated in pertinent part that it was "issu[ing] a writ of *mandamus* to the United States District Court for the Middle District of Alabama" directing the judge in question to vacate specific parts of an order he had entered. On December 19, 1990, the day following the court's order, the Clerk prepared a writ of *mandamus* "in conformity with this court's opinion of December 18, 1990."

Petitioners did not file their petition for writ of *certiorari* in the United States Supreme Court until March 19, 1991. The Clerk of the Court refused to docket it, in part because it was submitted out of time. Petitioners refiled the petition on April 4, 1991, claiming that the relevant date of judgment for purposes of Supreme Court Rule 13.1 was December 19, 1990, the date the writ was typed and signed by the Eleventh Circuit Clerk's office, rather than December 18, 1990, the date that the Eleventh Circuit rendered judgment.

An application for a writ of *certiorari* is untimely if filed more than ninety days after entry of the judgment sought to be reviewed. 28 U.S.C. §2101(c). Because the 90-day limit is "mandatory and jurisdictional," the Court must dismiss the State's petition if it was untimely filed. *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651,1660 (1990).

Rule 13.4 of the Supreme Court Rules provides that the "time for filing a petition for a writ of *certiorari* runs from the date the judgment or decree sought to be reviewed is rendered, not from the date of the issuance of the mandate (or its equivalent under local practice)" [emphasis added]. The judgment or decree sought to be reviewed in this case is the decision of the Eleventh Circuit to grant the respondents' petition

for a writ of *mandamus*.[4] It was that decision that fixed the rights and obligations of the parties and that decision that "settled with finality" the issues that had been litigated. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206,212 (1952).

To suggest that the Circuit Clerk's ministerial act of preparing and mailing the formal Writ of Mandamus clarified or explicated rights or obligations of the parties that were, until that time, not certain, is to ignore reality. *See Cole v. Violette*, 319 U.S. 581 (1943)(court's order was final on date of issuance, not on date clerk performed ministerial act of entering judgment, because the order itself disposed of all issues in the case). The judgment of the appellate court was neither "tentative, informal nor incomplete." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507,514 (1950); *cf. Scofield v. NLRB*, 394 U.S. 423,427 (1969) (opinion that called for further court action was not the final judgment and did not set the 90 day time limit running). To the contrary, the order was a "complete act of adjudication" and was clearly intended by the judges to dispose of all matters then pending before them in the case. *See U.S. v. Schaefer Brewing Co.*, 356 U.S. 227, 234-235 (1958).

The fact that December 18th rather than December 19th is the date judgment was rendered in this case is underscored by another simple fact. The December 18th decision is the only document that addresses each of the three issues on which plaintiff-respondents sought a writ of *mandamus*. Clearly, had plaintiff-respondents wished to request a rehearing in the

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[4]That the judgment sought to be reviewed is not the clerk's December 19th clerical act but the court's December 18th decision is acknowledged in the first sentence of petitioners' application:

> The petitioners respectfully pray that a writ of *certiorari* issue to review the granting of *mandamus* that the Eleventh Circuit Court of Appeals has issued to the Honorable Robert Varner, United States District [judge] for the Middle District of Alabama.

appellate court or to petition this Court for a writ of *certiorari* on the one issue that the Eleventh Circuit declined to consider for *mandamus* relief, the deadline for their doing so necessarily would have begun to run on December 18th, because no other "judgment" in the case fully adjudicated and finally settled the parties' respective rights.

III. *THERE ARE NO REASONS FOR GRANTING DISCRETIONARY REVIEW.*

Even if the Court determines that the petition in this case should not automatically be dismissed for having been untimely filed, the Court should refuse to grant the writ for three related reasons.

First, there are no "special and important reasons" for a grant of *certiorari* here. S. Ct. R. 10.1. Defendant-petitioners seek review of a procedural ruling that has been presented to this Court with different arguments and allegations than those advanced by defendant-petitioners to the court of appeals.

The dispositive issues in the petition for writ of *mandamus* were: (1) whether a judge could enter an order that removed two of three attorneys, including lead counsel, from a civil rights action they had decided to handle for a class of indigent prisoners under the speculative theory that, if successful in the litigation, their claim for fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, might contain duplicative billing; and (2) whether a judge could require an attorney to represent a particular individual despite ethical and professional conflicts related to that representation. Defendant-petitioners have done nothing in their petition other than to gloss over those issues, raise others that depend on a factual record that is not present here, *see Mishkin v. New York,* 383 U.S. 502 (1966), and rehash the arguments that the Eleventh Circuit already decided against them.

Second, none of the questions presented in the petition has much of anything to do with the facts of this case. Whether federal courts have inherent authority to require a lawyer to represent a particular litigant is not at issue here. When the district court issued its September 14, 1990 order appointing Ms. van Alstyne to represent Mr. Hoppins and directing that she be the sole attorney for the existing plaintiff class, it did so under that section of the United States Code dealing with the representation of indigents "unable to employ counsel." 28 U.S.C. §1915(d). There simply is no reason to assume that the court was proceeding on a more nebulous basis, given the fact that the federal statute directly governs such appointments. The fact that the district court's order did not specify the statutory provision under which the appointment was made hardly suffices as proof that it was made on any other basis. In fact, it stands to reason, given the decision in *Mallard v. U.S. Dist. Ct.*, ___ U.S. ___, 109 S. Ct. 1814 (1989), that if a court were trying to make a coercive or compulsory appointment of counsel, it would specifically note the basis for its action in order to distinguish its order from the typical request made pursuant to §1915(d).

The question of whether the courts' rule-making authority under 28 U.S.C. §2071 and Rule 83 of the Federal Rules of Civil Procedure might one day lead to the promulgation of a rule allowing the appointment of counsel in civil cases under some authority other than 28 U.S.C. §1915(d) is also not at issue in this case. At the present time, neither Rule 83 nor 28 U.S.C. §2071 endows the court with express authority to appoint counsel. And local rules for the Middle District of Alabama presently contain no reference to the appointment of counsel in civil cases. In addition, the general principle that district judges may regulate the conduct of litigation in their courtrooms cannot be transformed into a postulate that they have the power to enter orders that are inconsistent with or superfluous to statutory law.

Whether a *pro se* litigant is entitled to more than one court-appointed attorney is likewise not an issue in the case, given that the proposed plaintiff class in *Butler v. Hunt,* the case on which *certiorari* is being sought, never had any appointed counsel until the court's order of September 14, 1990, and it acquired only one attorney at that time.[5] The real issue in the case has nothing to do with the test for effective assistance of defense counsel articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), or with the question of "entitlement" to more than one court-appointed attorney in a criminal case. Rather, it has to do with the right of a judge to unreasonably and arbitrarily interfere with *pro bono* representation in a complex civil rights case under §1983 and with long-standing attorney-client relationships established between indigent litigants and their attorneys.

Finally, the question of "whether a writ of *mandamus* was improperly [sic] issued when there was no usurpation of power nor [sic] abuse of discretion" by the district court is nothing more than a conclusory allegation that calls for second-guessing the reasoned judgment of the court of appeals on factual issues presented in the *mandamus* petition. *Certiorari* is not granted for the purpose of reweighing evidence and reconsidering factual determinations. *See* S. Ct. R. 10.1.

Third, defendant-petitioners did not create a record below that supports many of their assertions. This is the first time, for example, that defendant-petitioners have explicitly claimed that the order appointing Ms. van Alstyne was not entered under the

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[5]Counsel for the defendant-petitioners have continuously ignored the fact that cases which are consolidated retain their separate identities. *See, e.g., McKenzie v. United States*, 678 F.2d 571 (5th Cir. 1982). They seem to believe that because an absent member of the class with ten pro se cases pending was appointed an attorney who later became involved in the *Butler* action, and another absent class member was appointed two attorneys, both of whom entered an appearance in the *Butler* class, the *Butler* plaintiffs themselves have court-appointed counsel. In fact, counsel voluntarily entered an appearance on behalf of the *Butler* plaintiffs and were never appointed to that case.

authority of 28 U.S.C. §1915(d). *See* Petition for Writ of *Certiorari* at 4.

In their responsive pleading to plaintiff-respondents' petition for writ of *mandamus*, defendant-petitioners never made such an assertion. Had there been any evidentiary basis for doing so, defendant-petitioners clearly would have argued that the holding in *Mallard* had nothing to do with the case. Instead, they argued that *Mallard* could be distinguished from the *Butler* case because the district court judge in *Mallard* had never been made a party to that action and because the *Butler* plaintiffs allegedly had alternative avenues available to them to obtain the desired relief short of a petition for writ of *mandamus*.[6]

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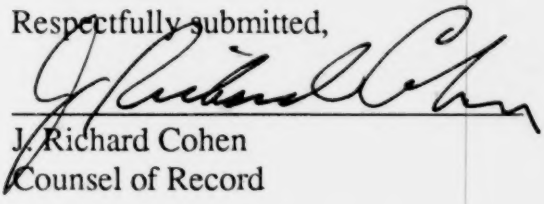
[6]Defendant-petitioners incorrectly argued in their answer to the plaintiffs' petition for writ of *mandamus* that the Court in *Mallard* "based its decision on the fact that no alternative remedies existed," and they have repeatedly emphasized the fact that the district court judge in that case was not made a litigant. Of course, the reason for the latter point was that Mallard's petition for a writ of *mandamus* had been erroneously denied by the Eighth Circuit. *Mallard*, 109 S.Ct. at 1822. With regard to defendant-petitioners' claim that alternative means existed for plaintiff-respondents to obtain relief from the judge's improper order, the Eleventh Circuit specifically found otherwise in its order.

CONCLUSION

Plaintiff-respondents urge the Court to deny this petition for writ of *certiorari* either because of its untimely filing or because of its failure to present issues and an unambiguous record that call for the Court's exercise of discretionary review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing by U. S. Mail, postage prepaid, on Alice Ann Boswell of the Alabama Department of Corrections, Legal Division, Gordon Persons Building, 50 N. Ripley Street, Montgomery, Alabama 36130; on David Byrne, Esq., Robison & Belser, 210 Commerce Street, Post Office Drawer 1470, Montgomery, Alabama 36102, and on Milt Belcher, Assistant Attorney General, Office of the Attorney General, 11 South Union Street, Montgomery, Alabama 36130 on this 6TH day of May, 1991.

Abigail P. van Alstyne
Attorney for Plaintiffs